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In The

Supreme Court of the United States

October Term, 1973

No. 73-542

JULEO, INC., a New Jersey Corporation,

Petitioner,

vs.

COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

Supreme Court of the United States

October Term, 1973

No.

JULEO, INC., a New Jersey Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on June 27, 1973.

Opinions Below

The opinion of the Tax Court is reported at 30 T.C.M. 284, 1971 and appears in Appendix B infra. The opinion of the Circuit Court of Appeals for the Court of Appeals for the Third Circuit entered on June 27, 1973, is unreported and appears in Appendix B infra.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was made and entered on June 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

In this suit the United States Tax Court found as an ultimate fact that the petitioner, a real estate developer, after notice of condemnation no longer held the property subject to condemnation as part of its inventory for development and sale in the ordinary course of its trade or business. The Court of Appeals below reversed with the majority holding that this ultimate finding of fact was clearly erroneous as a matter of law. The questions presented are:

1. Whether Section 1221(1) requires a factual determination that the property was held as inventory or investment at the date of disposition.

2. Whether consideration of the effect of the Notice of Condemnation in making a factual determination or whether there has been a change in the purpose for which property is held from inventory to investment is clearly erroneous as a matter of law.

3. Whether the Court has the discretionary right to determine whether gain realized from the sale of a capital asset as defined under Section 1221 should be taxed at capital gain or ordinary income rates.

Statutes Involved

The Federal Statute involved is Internal Revenue Code of 1954 (26 U.S.C.) Sec. 1221(1), Sec. 1201(a) and Sec. 1222(3)(references and citations in this petition are to sections of the Internal Revenue Code of 1954, as amended, unless otherwise indicated).

The New Jersey Statute involved is N.J. Stat. Ann. 40:55-1.18.

The pertinent statutory provisions are set forth in Appendix A.

Statement

The petitioner was engaged in the business of real estate development, home building and sales. In 1955, petitioner acquired a 100 acre tract of land in Bridgewater Township, New Jersey. The petitioner shortly after acquisition did engineering work and filed subdivision maps. Preliminary subdivision approval for the entire tract was obtained from the Township in 1956. This preliminary approval granted petitioner only limited right within a three year period to submit the whole or part of the plan for final subdivision approval, upon the same terms and conditions as the preliminary approval.

The petitioner obtained final subdivision approval for residential development of certain sections of the entire tract, which included only a small part of the 16.5 acre portion ultimately condemned.

During 1957, petitioner learned that the State of New Jersey planned to condemn this 16.5 acre portion of the entire tract. Upon learning of the proposed condemnation, petitioner ceased any plans for future development or exploitation of this 16.5 acre tract. The preliminary subdivision approval as to this 16.5 acre tract for which

final subdivision approval has not been obtained expired in 1959 and the land reverted back to its raw state. The sale to the State of New Jersey pursuant to condemnation proceedings was consummated on January 7, 1966.

The Tax Court found that the petitioner, in obtaining preliminary subdivision approval, resulted in this 100 acre tract being held by the taxpayer primarily for sale to customers in the ordinary course of its business and prior to the receipt of notice of condemnation. The Tax Court then found:

> "Ultimate Findings of Fact
>
> After the petitioner was notified by the State that 16.5 acres of the 100 acre tract held by the petitioner were subject to condemnation, the petitioner was not holding that portion of the tract primarily for sale to customers in the ordinary course of his trade or business within the meaning of Section 1221 (1). The 16.5 acre portion of the tract was a capital asset at the time of its sale to the State."

The Court of Appeals below reversed as the majority held that the Tax Court's ultimate finding of fact was clearly erroneous as a matter of law.

Reasons For Granting Writ

The decision below should be reviewed because it erroneously interprets Sec. 1221(1) and abrogates the function of the Tax Court in making the factual determination required under this section and is in direct conflict with the decisions of the Court of Appeals in the Tenth and Fifth Circuits, and is an attempt to grant to the Court a discretionary right to determine if gains realized from the sale of a capital asset should be entitled to capital

gain treatment, contrary to Sec. 1201(a) and will have a far reaching and substantial adverse effect upon the proper and uniform administration of Sec. 1221(1) and create substantial uncertainty in all situations where a taxpayer has realized gain from the sale of a capital asset.

I.

The decision is in direct conflict with the decisions in the Court of Appeals in the Tenth and Fifth Circuits.

The decision below is in direct conflict with the decisions in the Court of Appeals in the Tenth and Fifth Circuits viz *Tri-S Corporation v. Commissioner*, 48 T.C. 315 aff'd 400 F. 2d 862 (C.A. 10, 1968) and *Ridgewood Land Company, Inc. v. Commissioner*, 31 T.C.M. 39 aff'd per curiam No. 72-2949 (C.A. 5, 1973) unreported and appears in Appendix C *infra* which held that a notice of condemnation changes the character of undeveloped land held by real estate developer from inventory to a capital asset. The underlying rationale of these cases and in the Tax Court in this case, is that undeveloped property ceases to be part of the inventory of a real estate developer when he abandons his intention to develop said property for sale as developed property in the ordinary course of its trade or business. The notice of condemnation is presumed to have the aforesaid effect because the development of the land would become futile. The petitioner further evidenced the abandonment of his intention to develop and sell the property as developed in the ordinary course of this business by permitting the preliminary subdivision approval to expire.

The Court of Appeals below attempt to distinguish *Tri-S Corporation v. Commissioner, supra*, on the ground that the Court of Appeals did not affirm the Tax Court findings that the effect of the Notice of Condemnation

was to change the purpose for which the taxpayer held the raw land so as to become a capital asset, but held that the taxpayer never held raw land for sale to customers in its ordinary course of trade or business. This attempt to distinguish Tri-S is erroneous because it fails to recognize that raw land when held by a real estate developer for the purpose of development and sale in its ordinary course of business is inventory under Section 1221(1) even when undeveloped for an extended period of time. See *Ridgewood Land Company, Inc. v. Commissioner*, 31 T.C.M. 39, *aff'd per curiam*, No. 72-2949 (C.A. 5, 1973) and *Estate of Freeland v. Commissioner*, 25 T.C.M. 1473, *aff'd*, 393 F.2d 573 (C.A. 9, 1968). Therefore, it is the purpose for which the developer holds the raw land in question which determines if it is held as inventory or investment.

II.

The decision is erroneous for the reasons stated in the dissenting opinion below.

The Tax Court below found:

"Ultimate Findings of Fact

After the petitioner was notified by the State that 16.5 acres of the 100 acre tract held by the petitioner were subject to condemnation, the petitioner was not holding that portion of the tract primarily for sale to customers in the ordinary course of his trade or business within the meaning of Section 1221 (1). The 16.5 acre portion of the tract was a capital asset at the time of its sale to the State."

Reasons for Granting the Writ

The Court below was incorrect in holding that said Ultimate Findings of Fact by the Tax Court was clearly erroneous as a matter of law for the reasons stated in the dissenting opinion of Judge Gibbons, in the Court below, which read in part as follows:

> "Such an ultimate finding of fact, representing as it does an inference drawn from other facts, is not in the view of this Circuit subject to the clearly erroneous rule. *See Heebner v. Commissioner*, 280 F. 2d 228 (3d Cir.), *cert. denied*, 364 U.S. 921 (1960); *Pennroad Corp. v. Commissioner*, 261 F. 2d 325 (3d Cir. 1958), *cert. denied*, 359 F. 2d 958 (1959); *Kaltreider v. Commissioner*, 255 F. 2d 833 (3d Cir. 1958); *Philber Equipment Corp. v. Commissioner*, 237 F. 2d 129 (3d Cir. 1956). *But see Yara Engineering Corp. v. Commissioner*, 344 F. 2d 113 (3d Cir. 1965) (per curiam). In reviewing such ultimate findings of fact:
>
> 'Where the ultimate fact reasonably flows from the basic facts and especially where the basic facts are persuasive of the ultimate fact so found, this court will not disturb the finding of the trial court.' *Pennroad Corp. v. Commissioner, supra*, at 328.
>
> The determination whether real property is held primarily for sale to customers in the ordinary course of business is, of course, a factual determination. *E.g., Yara Engineering Corp. v. Commissioner, supra; Broughton v. Commissioner*, 333 F. 2d 492, 494-95 (6th Cir. 1964); *Kaltreider v. Commissioner, supra.* Several factors, no one of which is determinative, have been said to be significant in making that determination.
>
> 'No single factor or test is dispositive. Factors considered are: (1) the purpose for which the

property was acquired; (2) the purpose for which it was held; (3) improvements, and their extent, made to the property by taxpayer; (4) frequency, number and continuity of sales; (5) the extent and substantiality of the transactions; (6) the nature and extent of taxpayer's business; (7) the extent of advertising to promote sales, or the lack of such advertising; and (8) listing of the property for sale directly or through brokers.' *Kaltreider v. Commissioner, supra* at 838 (footnotes omitted).

In this case (1) the property was originally acquired for resale in the ordinary course of business; but (2) the resale purpose terminated with respect to 16.5 acres by force of necessity, and for *eight years* the taxpayer held that portion for a purpose other than resale in the ordinary course of business; (3) no improvements were made to the 16.5 acres and even the preliminary subdivision approval expired five years before the sale; (4) there were no sales from the 16.5 acres; (5) the only transaction was the sale pursuant to the judgment of condemnation; (6) retention of the 16.5 acres for eight years was inconsistent with the nature of the taxpayer's business; (7) the taxpayer did not advertise or promote sale of the 16.5 acres; and (8) the taxyaper did not list the property for resale through brokers. Under these circumstances I simply cannot agree with the majority that the Tax Court's ultimate findings of facts do not flow from the basic facts or that the basic facts are unpersuasive of the ultimate facts so found. See *Pennroad Corp. v. Commissioner, supra.* There is no reason for this court to be so zealous of guarding the revenue that we should arrogate to ourselves the task of fact finding which Congress entrusted to the Tax Court."

Reasons for Granting the Writ

III.

The decision erroneously attempts to grant to the Court the discretionary right to determine if gains should be taxed at ordinary or capital gain rates contrary to Sec. 1201(a).

The Court below stated that the reason for holding the gain realized by the petitioner should not be taxed at capital gain rates was the following:

> "Further, if there had been no condemnation, the land which was part of the development would have been sold as such and the proceeds treated as ordinary business income. When the condemnation took place, the owner sought to establish a value, for purpose of the condemnation award, that reflected what the owner would have received if the land had been sold as developed. Consequently, to treat the income actually received, which in large part reflected the intent and plan of the owner, as capital gains rather than ordinary income would appear to be inequitable. What development occurred on the remainder of the 100 acres prior to notice of condemnation necessarily enhanced the value of the 16 acres condemned."

The above statements do not support a conclusion that the condemnation award reflected the value of the land as developed and such a conclusion is not supported by the record below since there was no testimony before the Tax Court as to any of the factors used by the Superior Court of New Jersey in fixing the amount of judgment in condemnation.

Further, and more importantly, the factors which may have been considered in determining the amount of the

judgment in condemnation are not relevant in determining if the petitioner is entitled to be taxed on the gain realized at capital gain rates. The only issue which the Court should consider is whether the property held by the petitioner at the time of sale was a capital asset as defined under Sec. 1221 and not inventory, held primarily for sale in the ordinary course of its business for development and sale under Sec. 1221(1), since the capital gain realized from the sale of a capital asset as defined in Sec. 1222(3) is entitled to be taxed at capital gain rates under Sec. 1201(a).

Conclusion

For the reasons set forth above, it is respectively submitted that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

s/ Robert B. Hendler
ROBERT B. HENDLER
RALPH MAYO
Attorneys for Petitioners

Appendix A - Statutes Involved

40:55—1.18

Approval or recommendation of approval of plat; submission to governing body for approval; tentative approval; final approval.

The planning board, after hearing, may approve the plat, if so authorized, or may recommend approval by giving favorable referral to the governing body or may disapprove such plat. If the planning board disapproves any plat, the findings and reasons for such disapproval shall be stated upon the records of the planning board and the applicant shall be given a copy. If the planning board requires any substantial amendment in the layout of improvements proposed by the subdivider that have been the subject of a hearing, an amended plat must be submitted, and proceeded upon as in the case of the original plat.

The planning board shall take action under this section within 45 days after the submission of the final plat for approval, or within such further time as the applying party may agree to. Otherwise such plat shall be deemed to have been given favorable approval or referral to the governing body, and the certificate of the municipal clerk as to the date of the submission of the plat for approval or referral and as to the failure of the planning board to report action thereon within the aforesaid 45 days or such further time as agreed to by the applying party shall be issued on request of the owner or his agent and shall be sufficient, in lieu of the written endorsement or other evidence of favorable approval or referral herein required.

Following favorable referral by the planning board where referral is required, the plat shall be submitted to the governing body for approval. The governing body shall take action under this section not later than the second

regular meeting after the planning board submits the plat to the municipal clerk for transmission to the governing body, or within such further time as the applying party may agree to. Otherwise such plat shall be deemed to have been approved, and the certificate of the municipal clerk as to the date of the submission of the plat for approval by the governing body, and as to the failure of the governing body to act thereon not later than the second regular meeting or such further time as agreed to by the applying party, shall be issued on request of the owner or his agent and shall be sufficient, in lieu of the written endorsement or other evidence of approval herein required. If the governing body disapproves any plat, the findings and reasons for such action shall be stated upon the records of the governing body, and the applicant shall be given a copy.

The governing body or the planning board, as the case may be, may tentatively approve a plat showing new streets or roads or the resubdivision of land along a mapped street. This tentative approval shall confer upon the applicant the following rights for a 3-year period from the date of the tentative approval:

(1) that the general terms and conditions upon which the tentative approval was granted will not be changed.

(2) that the said applicant may submit on or before the expiration date the whole or part or parts of said plat for final approval.

The final approval by the governing body or the planning board, as the case may be, of a plat showing a new street or the resubdivision of land along a mapped street shall expire 90 days from the date of such approval, unless within the period such plat shall have been duly filed by the owner or his agent with the county recording

officer. The governing body for good cause shown may extend the time for plat filing for a period not to exceed 90 days. L.1953, c. 433, p. 2178, section 18, as amended L.1960, c. 145, p. 672, section 1, eff. Jan. 1, 1961.

SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include —

(1) stock in trade of the taxpayer or other property of a find which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

SEC. 1201. ALTERNATIVE TAX.

(a) Corporation. — If for any taxable year the net long-term capital gain of any corporation exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 11, 511, 821(a) or (c), and 831(a), there is hereby imposed a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of —

(1) a partial tax computed on the taxable income reduced by the amount of such excess, at the rates and in the manner as if this subsection had not been enacted, and

(2) an amount equal to 25 percent of such excess, or, in the case of a taxable year beginning before April 1, 1954, an amount equal to 26 percent of such excess.

In the case of a taxable year beginning before April 1, 1954, the amount under paragraph (2) shall be determined without regard to section 21 (relating to effect of change of tax rates).

Statutes Involved

P.L. 1-72 Sec. 511(b)

Amended Sec. 1201(a) effective for taxable years beginning after December 31, 1969.

SEC. 1222. OTHER TERMS RELATING TO CAPITAL GAINS AND LOSSES.

For purposes of this subtitle —

(1) . . .

(2) . . .

(3) LONG-TERM CAPITAL GAIN. — The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income.

Appendix B - Opinions Below

(Filed June 27, 1973)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2102

JULEO, INC., A New Jersey Corporation

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant

APPEAL FROM THE UNITED STATES TAX COURT

SUBMITTED OCTOBER 20, 1972
Under Third Circuit Rule 12(6)
Before STALEY, GIBBONS and ROSEN,*Circuit Judges.

RESUBMITTED MARCH 19, 1973
Under Third Circuit Rule 12(6)
Before STALEY, ADAMS and GIBBONS, Circuit Judges.

Scott P. Crampton,
Assistant Attorney General,
Meyer Rothwacks
Bennet N. Hollander
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Attorneys, Tax Division
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---

* Judge Rosen died before the opinion was filed.

Opinions Below

Ralph Mayo
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By STALEY, Circuit Judge.

This is an appeal from the decision of the Tax Court that a 16.5 acre tract of land was a capital asset at the time it was transferred to the State of New Jersey as a result of condemnation proceedings. The following is a statement of the Tax Court's findings as to the basic facts — the actual happenings—in this case.

The taxpayer is a New Jersey corporation organized for the purpose of real estate development, homebuilding, and sales. In 1955 it purchased a 100 acre tract of land for the purpose of development and sale. Shortly thereafter the process of development began. Subdivision maps were filed, engineering work was done, and preliminary approval for the subdivision of the entire 100 acres was obtained. In 1957 final approval was secured from the township for residential development of the section of the tract which included a small portion of the 16.5 acres involved in this case.

During the year 1958 the taxpayer became aware of New Jersey plan to condemn approximately 16 acres of the larger tract in highway construction. At that point all planning for the development of the land scheduled for condemnation ceased. Work did continue, however, on the remainder of the 100 acre tract. After the taxpayer learned of the condemnation plans with respect to the 16.5 acre parcel, it advertised and sold residential lots in the remaining portions of the 100 acre tract. In addition, two commercial lots of 5 acres each were sold and 10 acres on the highway were leased.

Opinions Below

On January 7, 1966, the sale to the State of New Jersey was consummated. The income derived from this transaction was reported by the taxpayer as capital gain. On petition for review from the Commissioner's ruling that the gain represented ordinary income, the Tax Court upheld the taxpayer. The court in so doing held that:

> "After the petitioner was notified by the state that 16.5 acres of the 100 acre tract held by the petitioner were subject to condemnation, the petitioner was not holding that portion of the tract 'primarily for sale to customers in the ordinary course of his trade or business' within the meaning of section 1221(1). The 16.5 acre portion of the tract was a capital asset at the time of its sale to the state."

Prior to the condemnation notice, according to the court's findings, the land in question was held primarily for sale to customers in the ordinary course of trade or business.

In reaching its conclusion that after the condemnation notice the land became a capital asset, the court relied upon CIR v. Tri-S Corp., 400 F. 2d 862 (C.A.10, 1968). The Tri-S case was cited as holding that a condemnation notice converted land held primarily for sale to customers in the ordinary course of business into a capital asset. Although this was the reasoning of the Tax Court in Tri-S,* this circuit court of appeals did not affirm on that ground. Rather, the appeals court held that the taxpayer never held the land in question for sale in its raw state to customers in the ordinary course of its trade or business. That court did not comment upon the Tax Court's finding that up to the time of condemnation the land involved was not held a capital asset. Clearly, the Tax Court's reliance on the Tri-S case was error.

---

* Tri-S Corp. v. CIR, 48 T.C. 316 (1967).

Opinions Below

Of course, this court is not bound by a conclusion induced by an erroneous view of the law, Municipal Bond Corp. v. CIR, 341 F. 2d 683 (C.A.8 1965). A condemnation notice does not change land held primarily for sale to customers in the ordinary course of business into a capital asset. See Stockton Harbor Industrial Co. v. CIR, 2 F. 2d 638 (C.A.9 1954).

Further, if there had been no condemnation, the land which was part of the development would have been sold as such and the proceeds treated as ordinary business income. When the condemnation took place, the owner sought to establish a value, for purpose of the condemnation award, that reflected what the owner would have received if the land had been sold as developed. Consequently, to treat the income actually received, which in large part reflected the intent and plan of the owner, as capital gains rather than ordinary income would appear to be inequitable. What development occurred on the remainder of the 100 acres prior to notice of condemnation necessarily enhanced the value of the 16 acres condemned. This is illustrated by the fact that the pro-rated purchase price of the 16 acres was $10,032.62 and the condemnee received $97,650.63. In view of the present concern about the uneven impost of the tax laws, it does not appear warranted to interpret the law in such manner as to confer still another benefit not clearly mandated by the statute and regulations, and as stated above, there is no case authority for doing so.

For the foregoing reasons, the decision of the Tax Court will be reversed and the cause remanded for further proceedings consistent with this opinion.

To the Clerk:

File the foregoing opinion.

s/ Staley
Circuit Judge

Opinions Below

Juleo, Inc., a New Jersey Corporation v. Commissioner of Internal Revenue, Appellant No. 71-2102

GIBBONS, Circuit Judge, dissenting

The taxpayer is a corporation engaged in the business of real estate development and home building. In 1955 it purchased a 100 acre tract of land in Bridgewater Township, New Jersey, intending to develop and sell. Shortly thereafter taxpayer filed subdivision maps and had some engineering work done. Preliminary approval for a subdivision of the entire tract was obtained in 1956. That preliminary approval conferred on the landowner only the limited right, during a three-year period, to submit the whole or parts of the plat for final approval upon the same general terms and conditions of the preliminary approval. N.J. Stat. Ann. Section 40:55-1.18. Final approval of sections of the entire tract was requested and obtained in 1957. Only a small part of the 16.5 acres of the tract, sale of which produced the gain involved in this case, was included in such final approval. During 1958 the taxpayer learned that the State of New Jersey contemplated acquiring approximately 16 of the 100 acres for use in the construction of a highway, Route 287. After learning of the State's plans the taxpayer ceased further development of the 16.5 acre tract. The preliminary subdivision approval, as to all of the 16.5 acres for which final approval had not been obtained expired in 1959 under the terms of the Municipal Planning Act. N.J. Stat. Ann. Section 40:55-1.18. The State's highway plans were not formalized until 1960. It was not until 1962 that the taxpayer and the State began discussions respecting

condemnation. In 1965 the Commissioners of Condemnation made an award of approximately $50,000 for the 16.5 acres. The taxpayer appealed this award to the Superior Court of New Jersey, and in 1965 obtained a judgment in condemnation of $97,650.63. The sale pursuant to the condemnation judgment was not closed until January 7, 1966, and on its 1966 tax return the taxpayer reported a capital gain on that sale in the amount of $70,950.30. The remaining 83.5 acres were developed in accordance with its final subdivision approval and sold or leased. The Tax Court, rejecting the Commissioner's deficiency notice for 1966, found:

> "Ultimate Findings of Fact
>
> After the petitioner was notified by the state that 16.5 acres of the 100 acre tract held by the petitioner were subject to condemnation, the petitioner was not holding that portion of the tract 'primarily for sale to customers in the ordinary course of his trade or business' within the meaning of section 1221(1). The 16.5 acre portion of the tract was a capital asset at the time of its sale to the state."

Under section 1221 of the Internal Revenue Code the term capital asset does not include "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business . . . ." The word "primarily" means of first importance or principally. Malat v. Riddell, 383 U.S. 569 (1966) (per curiam). When the taxpayer first acquired the 100 acres it did so primarily for sale or lease to customers in the ordinary course of its business as a real estate developer and home builder. Thus, in 1955 no part of the 100 acres was a capital asset. But the nature of the asset, for tax purposes, is determined not at the time of its

acquisition, but at the time its sale produces for the taxpayer a taxable gain or loss.

A taxpayer may, for example, acquire a farm intending to operate it. At the time of acquisition it is a capital asset. If years later the taxpayer obtains a subdivision approval and begins selling off lots, the Internal Revenue Service will insist, quite correctly, that at the time of sale the farm was held not as a capital asset but primarily for sale in the former farmer's new trade or business of land development. The converse is equally true. Land once held primarily for resale may be withdrawn from the market and held for another purpose. See Nadalin v. United States, 364 F. 2d 431 (Ct.Cl. 1966); Ackerman v. United States, 335 F. 2d 521 (5th Cir. 1964); Ridgewood Land Co., Inc. v. Commissioner, 31 CCH Tax Ct. Mem. 39 (1972); Tri-S Corp. v. Commissioner, 48 T.C. 316 (1967), aff'd, 400 F. 2d 862 (10th Cir. 1968). The Tax Court found as an ultimate fact that such a change in the taxpayer's purpose for holding the 16.5 acres had taken place.

Such an ultimate finding of fact, representing as it does an inference drawn from other facts, is not in view of this Circuit subject to the clearly erroneous rule. See Heebner v. Commissioner, 280 F. 2d 228 (3d Cir.), cert. denied, 364 U.S. 921 (1960); Pennroad Corp. v. Commissioner, 261 F. 2d 325 (3d Cir. 1958), cert. denied, 359 F. 2d 958 (1959); Kaltreider v. Commissioner, 255 F. 2d 833 (3d Cir. 1958); Philber Equipment Corp v. Commissioner, 237 F. 2d 129 (3d Cir. 1956). But see Yara Engineering Corp. v. Commissioner, 344 F. 2d 113 (3d Cir. 1965) (per curiam). In reviewing such ultimate findings of fact:

> "where the ultimate fact reasonably flows from the basic facts and especially where the basic facts are persuasive of the ultimate fact so found, this court

> will not disturb the finding of the trial court." Pennroad Corp. v. Commissioner, supra, at 328.

The determination whether real property is held primarily for sale to customers in the ordinary course of business is, of course, a factual determination. E.g., Yara Engineering Corp. v. Commissioner, supra; Broughton v. Commissioner, 333 F. 2d 492, 494-95 (6th Cir. 1964); Kaltreider v. Commissioner, supra. Several factors, no one of which is determinative, have been said to be significant in making that determination.

> "No single factor or test is dispositive. Factors considered are: (1) the purpose for which the property was acquired; (2) the purpose for which it was held; (3) improvements, and their extent, made to the property by taxpayer; (4) frequency, number and continuity of sales; (5) the extend and substantiality of the transactions; (6) the nature and extent of taxpayer's business; (7) the extent of advertising to promote sales, or the lack of such advertising; and (8) listing of the property for sale directly or through brokers." Kaltreider v. Commissioner, supra at 838 (footnotes omitted).

In this case (1) the property was originally acquired for resale in the ordinary course of business; but (2) the resale purpose terminated with respect to 16.5 acres by force of necessity, and for eight years the taxpayer held that portion for a purpose other than resale in the ordinary course of business; (3) no improvements were made to the 16.5 acres and even the preliminary subdivision approval expired five years before the sale; (4) there were no sales from the 16.5 acres; (5) the only transaction was the sale pursuant to the judgment of condemnation; (6) retention of the 16.5 acres for eight years was inconsistent with the nature of the taxpayer's business; (7) the taxpayer did not advertise or promote sale of the 16.5 acres; and (8) the

taxpayer did not list the property for resale through brokers. Under these circumstances I simply cannot agree with the majority that the Tax Court's ultimate findings of facts do not flow from the basic facts or that the basic facts are unpersuasive of the ultimate facts so found. See Pennroad Corp. v. Commissioner, supra. There is no reason for this court to be so zealous of guarding the revenue that we should arrogate to ourselves the task of fact finding which Congress entrusted to the Tax Court. I would affirm.

United States Court of Appeals

For The Third Circuit

No. 71-2102

JULEO, INC., A NEW JERSEY CORPORATION,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellant.

(Tax Court Docket No. 4910-69)

ON APPEAL FROM A DECISION OF THE TAX COURT

OF THE UNITED STATES

Present: *STALEY, ADAMS and GIBBONS, Circuit judges

* The panel to which this case was originally submitted consisted of Circuit Judges Staley, Gibbons and Rosen. Judge Rosen died before the opinion on resubmission to the above panel was filed.

JUDGMENT ON RESUBMISSION

This cause came on to be heard on the record from the Tax Court of the United States, and was submitted, and later resubmitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby reversed, and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

s/Thomas P. Finn
Clerk

June 27, 1973

Opinions Below

[CCH Dec. 30,724(M)] Juleo, Inc., a New Jersey Corporation v. Commissioner.

Docket No. 4910-69. T. C. Memo. 1971-68. Filed April 12, 1971.

Ralph Mayo, 73 Paterson St., New Brunswick, N. J., for the petitioner. Thomas S. Carles, for the respondent.

Memorandum Findings of Fact and Opinion

QUEALY, Judge: The respondent determined a deficiency in the Federal income tax due from the petitioner Juleo, Inc. for petitioner's taxable year ended October 31, 1966 in the amount of $9,829.49.

The only issue presented for decision is whether condemnation by the State of New Jersey of property held by the petitioner primarily for sale to customars in the ordinary course of business converts the character of the property so that the property becomes a capital asset as defined by section 1221.[1]

Findings of Fact

Some of the facts have been stipulated. The stipulation of facts and the exhibits attached thereto are incorporated herein by this reference.

Juleo, Inc. (hereinafter referred to as "petitioner") is a domestic corporation duly organized and existing under the laws of the State of New Jersey. At the time of the filing of the petition herein and at all times material hereto, the principal place of business and office of the petitioner was located in Somerville, New Jersey.

1. All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

Opinions Below

The petitioner filed its corporate income tax return for the fiscal year ended October 31, 1966 with the district director of internal revenue at Newark, New Jersey.

Petitioner was organized in 1954 for the purpose of real estate development, home building and sales. Petitioner and a sister corporation, C & C Home Builders, Inc., are owned by two brothers, Leo and Julian Chmil. Both of the corporations are engaged in the business of real estate development and home building.

During the calendar year 1955, petitioner acquired a 100 acre tract of land located in Bridgewater Township, State of New Jersey (hereinafter referred to as the "Township"). The purchase price of this tract was approximately $140,000. Of this amount, $10,032.62 is the prorated price of the 16.5 acres which were ultimately condemned by the State of New Jersey.

The entire 100 acre tract was acquired and held for the purpose of development and sale, and shortly after its acquisition, the petitioner began the process of developing the tract. Subdivision maps were filed and engineering work was done. Preliminary approval for a subdivision was obtained from the Township on the entire 100 acre tract in 1956, and final approval for residential development of three sections, including a small part of the 16.5 acre portion ultimately condemned, was obtained in 1957.

The process of obtaining preliminary approval from the Township served to increase the value of the 100 acre tract of real estate. The petitioner's action in obtaining preliminary approval from the Township resulted in the 100 acre tract becoming part of petitioner's inventory as a real estate dealer or property held by petitioner primarily for sale to customers in the ordinary course of his trade or business.

Opinions Below

During the calendar year 1958, the petitioner learned that the State of New Jersey planned to condemn approximately 16 acres of the 100 acre tract for use in the construction of a highway, Route 287. In 1960, the highway was formalized, and in 1962, petitioner entered formal discussions with the state concerning condemnation of a 16.5 acre tract. In 1965, the commissioners on condemnation made a final offer of $50,000 for the 16.5 acre tract. The petitioner appealed this award, and judgment was entered by the Superior Court of the State of New Jersey herein petitioner was awarded $97,650.63 for this 16.5 acre tract. The sale was consummated on January 7, 1966.

The basis of petitioner's appeal from the initial award of $50,000 was based on the premise that the condemnation would damage potential commercial property as well as potential residential property.

The ultimate gain to petitioner as a result of the condemnation was $70,950.30. This amount represented substantially all of the petitioner's income for the taxable year 1966 and was reported by the petitioner as a capital gain.

Subsequent to learning that the State of New Jersey planned to condemn approximately 16 acres of the 100 acre tract, petitioner did not proceed with any further development or exploitation of the 16 acre tract. However, during the years 1957 through 1968, the petitioner continued the development of the remainder of the 100 acre tract and engaged in sales activity with respect to such remainder during the course of which the petitioner advertised and sold residential lots. In addition, petitioner also sold two commercial plots of 5 acres each and leased 10 acres on the highway from the remainder of the 100 acre tract.

Opinions Below

Subsequent to the sale of the 16.5 acre tract through condemnation, the petitioner purchased additional similar property to continue operation.

The petitioner did not solicit the State of New Jersey to condemn the 16.5 acre tract, and the condemnation was involuntary as to the petitioner.

Ultimate Findings of Fact

After the petitioner was notified by the state that 16.5 acres of the 100 acre tract held by the petitioner were subject to condemnation, the petitioner was not holding that portion of the tract "primarily for sale to customers in the ordinary course of his trade or business" within the meaning of section 1221(1). The 16.5 acre portion of the tract was a capital asset at the time of its sale to the state.

Opinion

In this case, petitioner was a real estate dealer who engaged in both residential and commercial land transactions. Petitioner purchased a 100 acre tract of real estate and immediately took steps to render the property salable. As a result of initiating such steps, the property became part of petitioner's real estate inventory or property held by the petitioner primarily for the sale to customers in the ordinary course of his trade or business, and the property was so held at the time of the receipt of the notice of condemnation.

Section 1221(1)[2] excludes inventory or property held

2. SEC. 1221. CAPITAL ASSET DEFINED.
For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—
(1) stock in trade of the taxpayer or other property of a find which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business

for the sale to customers in the ordinary course of trade or business from the definition of a capital asset and thus from the benefits of capital gain treatment. The only issue presented for decision is whether the notice of condemnation by the State of New Jersey as to a 16.5 acre portion of the 100 acre tract removed this 16.5 acre portion from inventory or from classification as property held by the petitioner primarily for the sale to customers in the ordinary course of his trade or business so as to enable the petitioner to qualify for capital gain treatment on the gain it derived from the condemnation sale.

In Tri-S Corp.[Dec. 28, 500], 48 T. C. 316 (1967), aff'd.[68-2 USTC Par. 9541] 400 F. 2d 862 (C. A. 10, 1968), this Court found that prior to the receipt of a condemnation notice, the property in question was held by the taxpayer therein primarily for sale to customers in the ordinary course of business but that after the receipt of the condemnation notice the property ceased to be property held primarily for sale to customers in the ordinary course of trade or business.

We regard the holding of the Tri-S Corp. case as determinative of the issue now before us. After the condemnation notice in this case, petitioner no longer held the 16.5 acre tract primarily for sale to customers in the ordinary course of its trade or business, and the property sold to the State of New Jersey was a capital asset at the time of its sale.

Decision will be entered under Rule 50.

Appendix C - Conflicting Opinion

Ridgewood Land Company, Inc., Petitioner-Appellee-Cross Appellant v. Commissioner of Internal Revenue, Respondent-Appellant-Cross Appellee.

U. S. Court of Appeals, 5th Circuit, No. 72-2949, 3/23/73. Affirming Tax Court, 31 TCM 39, CCH Dec. 31,219(M), T. C. Memo 1972-16.

* * *

Charles L. Brocato, Hugh C. Montgomery, 1801 Deposit Guaranty Bank Bldg., Jackson, Miss., for petitioner-appellee-cross appellant. Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks, Robert S. Watkins, Department of Justice, Washington, D. C. 20530, Lee H. Henkel, Chief Counsel, Raymond W. Sifly, Internal Revenue Service, Washington, D. C., for respondent-appellant-cross appellee.

Before WISDOM, GEWIN and COLEMAN, Circuit Judges.

PER CURIAM: This Case is here on briefs and oral argument in the appeal of the Commissioner of Internal Revenue from a decision of the Tax Court of the United States, filed January 19, 1972 [CCH Dec. 31,219(M)].

The issue is whether, under the particular facts of the case, profits realized on 80.89 acres of land sold under direct threat of condemnation for public purposes are due to be taxed as ordinary income rather than as long-term capital gains.

The Tax Court found as facts: (1) that Ridgewood Land Company, Inc., acquired the property in 1962, for development and sale to customers in the ordinary course of its business; (2) that on October 12, 1965, while the land was yet in an undeveloped state, the Mississippi State Highway Department authorized its condemnation so as to

acquire "fill dirt" for use on a highway construction project; and that (3) after Ridgewood learned that its original plans could not be accomplished because of the impending condemnation, it changed those intentions and thereafter held the acreage for investment.

Therefore, said the Tax Court, the acreage was a capital asset at the time of its sale to the construction contractor who expected to use it for the aforesaid purposes of the State Highway Department.

Finding ourselves in agreement with the decision of the Tax Court on this point, its Judgment is affirmed.

The taxpayer cross appeals the finding that the acreage was not originally acquired for investment. It is not necessary that we reach or decide that issue.

On both appeal and cross-appeal, the Judgment of the Tax Court is

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JULIO, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court (Pet. App. 15a-19a) are unofficially reported at 30 T.C.M. 284. The opinion of the court of appeals (Pet. App. 5a-14a) is reported at 483 F. 2d 47.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1973. The petition for a writ of certiorari was filed on September 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether real property which is not a capital asset because it is held primarily for sale to customers in the ordinary course of business automatically becomes a capital asset upon the owner's receipt of a notice of condemnation of the property.

STATUTES INVOLVED

Sections 1201, 1221, and 1222 of the Internal Revenue Code of 1954 are set forth at Pet. App. 3a-4a.

STATEMENT

Petitioner is a New Jersey corporation organized in 1954 for the purpose of real estate development, home building, and sales. During 1955, petitioner purchased a 100-acre tract of land for the purpose of development and sale, and shortly thereafter began developing the tract. The Tax Court found, and petitioner does not now dispute, that the 100-acre tract of land became part of petitioner's inventory as a real estate dealer as property held primarily for sale to customers in the ordinary course of its trade or business within the meaning of Section 1221(1) of the Code (Pet. App. 15a-16a).

In 1958, petitioner informally learned that the State of New Jersey planned to condemn approximately 16 acres of the 100-acre tract for use in the construction of a highway. The state thereafter formally condemned the property, and after negotiations, it made a final award in 1965 to petitioner of $50,000. Petitioner appealed this award to a state court, which entered judgment in its favor in the amount of $97,650.63 for 16.5 acres of condemned land. Petitioner's appeal from the initial award of $50,000 was based on the premise that the condemnation would damage potential commercial property as well as potential residential property. The condemnation was consummated on January 7, 1966 (Pet. App. 17a).

As a result of the condemnation, petitioner realized a gain of $70,950.30. On its federal income tax return for its taxable year ended October 31, 1966, petitioner reported this amount as a capital gain. Upon examination of the return, the Commissioner of Internal Revenue determined that the gain realized upon condemnation of the 16.5 acres was taxable as ordinary income because petitioner held the land primarily for sale to customers in the ordinary course of its trade or business. Under such circumstances, the land was not a capital asset.

The Tax Court set aside the Commissioner's determination, concluding that once petitioner received notice of the proposed condemnation, it no longer held the land primarily for sale to customers because the notice converted the character of the property to that of a capital asset. In so holding, the Tax Court considered its prior decision in *Tri-S Corp.* v. *Commissioner,* 48 T.C. 316, affirmed on another ground, 400 F. 2d 862 (C.A. 10), to be determinative of the question (Pet. App. 17a-19a). On the government's appeal, the Third Circuit reversed, with one judge dissenting. The majority held that a condemnation notice does not of itself convert land held primarily for sale to customers in the ordinary course of business into a capital asset (Pet. App. 5a-14a).

ARGUMENT

1. Section 1221 of the Internal Revenue Code defines the term "capital asset" negatively by providing five exclusions from the definition. The first statutory exclusion states that a capital asset shall not include "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

Petitioner does not challenge the Tax Court's finding (Pet. App. 16a) that prior to receipt of the notice of condemnation it acquired and held the land primarily for sale to customers in the ordinary course of its business. The Tax Court, however, held that the notice of condemnation automatically converted the property into a capital asset so that the gain petitioner realized upon condemnation was taxable as capital gain. The Third Circuit properly rejected that theory, holding that land that was held initially for sale to customers in the ordinary course of business did not cease to be such after the owner received a notice of condemnation. The only function of the notice of condemnation was to begin the process by which petitioner's ownership would be terminated. See, *e.g.*, *Stockton Harbor Indus. Co.* v. *Commissioner*, 216 F. 2d 638 (C.A. 9).

2. Contrary to petitioner's argument (Pet. 5-6), there is no conflict between the decision below and that of the Tenth Circuit in *Commissioner* v. *Tri-S Corp.*, 400 F. 2d 862, affirming on another ground 48 T.C. 316. There, the Tax Court held that land which was held primarily for sale to customers in the ordinary course of the taxpayer's business automatically ceased to be so held after receipt of a condemnation notice. However, as the court of appeals here correctly recognized (Pet. App. 7a), the Tenth Circuit did not affirm *Tri-S* on the theory of the Tax Court. To the contrary, it sustained the taxpayer's claim to capital gains treatment on the sole ground that the taxpayer held the land for investment before receipt of the notice of condemnation, and therefore it had never held the property for sale to customers in the ordinary course of its trade or business.

Similarly, there is no conflict with the decision of the Fifth Circuit in *Ridgewood Land Co.* v. *Commissioner*, 477 F. 2d 135, affirming *per curiam* 31 T.C.M. 39 (Pet. 5-6). There, the Tax Court upheld capital gains treatment on two independent grounds. First, in conformity with its *Tri-S* holding, it concluded that a notice of condemnation automatically changed the character of property held primarily for sale to customers to that of a capital asset. Secondly, it found that when the taxpayer learned of the state's intention to institute eminent domain proceedings, it changed its original purpose with respect to the property and thereafter held it for investment. As a result, the gain from a subsequent sale, which was made to a third party and not to the condemning governmental authority, was held to be taxable as capital gain.

The Fifth Circuit affirmed. By underscoring the phrase "under the particular facts of the case" and setting forth the Tax Court's finding concerning the taxpayer's change of purpose, the Fifth Circuit's *per curiam* opinion emphasized the restricted scope of its holding. Since the Fifth Circuit's opinion does not cite the Tax Court's *Tri-S* decision, there is no basis for petitioner's assertion of a conflict between the decision below and *Ridgewood*.

In short, neither the Tenth nor the Fifth Circuit has adopted the rationale of the Tax Court's *Tri-S* holding, rejected by the court of appeals below, that a notice of condemnation of itself automatically changes the character of property held primarily for sale to customers in the ordinary course of business to a capital asset. There is therefore no conflict among the circuits.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1973.

DOJ-1973-11